

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
REPLY BRIEF**

ORIGINAL **74-2529**

To be argued by
MELVIN I. FRIEDMAN

United States Court of Appeals
FOR THE SECOND CIRCUIT

JAMES L. McCARTHY, HUBERTA McCARTHY, PETER F. FAY
and SHARON L. FAY,

Plaintiffs,

SHARON L. and PETER F. FAY,

Plaintiffs-Appellants,

against

EAST AFRICAN AIRWAYS CORPORATION, BRITISH AIRCRAFT CORPORATION, Ltd., BRITISH AIRCRAFT CORPORATION (Commercial Aircraft), Ltd., BRITISH AIRCRAFT CORPORATION (Operating), Ltd., BRITISH AIRCRAFT CORPORATION (U. S. A.), Inc., DUNLOP LIMITED, DUNLOP HOLDINGS, DUNLOP CO. OF GREAT BRITAIN and BRITISH OVERSEAS AIRWAYS CORPORATION, now known as British Airways,

Defendants,

EAST AFRICAN AIRWAYS CORPORATION,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

KREINDLER & KREINDLER
Attorneys for Plaintiffs-Appellants
99 Park Avenue
New York, New York 10016
(212) 687-8181

Of Counsel:

MELVIN I. FRIEDMAN
MILTON G. SINCOFF
JAMES J. SULLIVAN

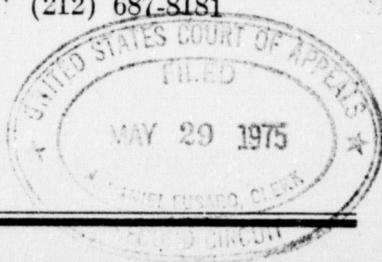


TABLE OF CONTENTS

	PAGE
Statement	1
POINT I—To deny the Fays, Americans and citizens of a State, access to the federal courts would vio- late their Constitutional rights	2
Conclusion	4
 CASES CITED	
<i>Cohens v. Virginia</i> , 19 U.S. (6 Wheat) 264, 378 (1821)	3
<i>Gmo. Niehaus & Co. v. United States</i> , 373 F.2d 944 (U.S. Ct. Cl., 1967)	2
<i>Hannevig v. United States</i> , 84 F.Supp. 743 (U.S. Ct. Cl., 1949)	2
<i>Shafter v. United States</i> , 273 F.Supp. 152 (S.D.N.Y., 1967), <i>aff'd</i> , 400 F.2d 584 (2d Cir. 1968) <i>cert.</i> <i>denied</i> , 393 U.S. 1086 (1969)	2
 STATUTES CITED	
United States Constitution, Article III Section 2	3
28 U.S.C.	
Section 1332(a)(2)	3

United States Court of Appeals

FOR THE SECOND CIRCUIT

JAMES L. McCARTHY, HUBERTA McCARTHY, PETER F. FAY
and SHARON L. FAY,

Plaintiffs,

SHARON L. and PETER F. FAY,

Plaintiffs-Appellants,

against

EAST AFRICAN AIRWAYS CORPORATION, BRITISH AIRCRAFT CORPORATION, Ltd., BRITISH AIRCRAFT CORPORATION (Commercial Aircraft), Ltd., BRITISH AIRCRAFT CORPORATION (Operating), Ltd., BRITISH AIRCRAFT CORPORATION (U. S. A.), Inc., DUNLOP LIMITED, DUNLOP HOLDINGS, DUNLOP CO. OF GREAT BRITAIN and BRITISH OVERSEAS AIRWAYS CORPORATION, now known as British Airways,

Defendants,

EAST AFRICAN AIRWAYS CORPORATION,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

Statement

Plaintiffs-appellants, adhering to the contentions heretofore made on this appeal, respectfully submit this reply brief in answer to certain arguments made by defendant-appellee East African Airways Corporation (East African) in Point II of its Brief.



POINT I

To deny the Fays, Americans and citizens of a State, access to the federal courts would violate their Constitutional rights.

The plaintiffs submit that only Congress can limit or restrict the jurisdiction that Congress has conferred upon the federal district courts. Assuming the federal district courts "possess only such jurisdiction as is conferred upon them by Congress" (as stated on page 17 of East African's Brief), it must follow that only Congress can divest them of the jurisdiction conferred. The *Congress* has *not* limited the diversity jurisdiction of the federal district courts in cases involving American citizens who engage in international transportation and, therefore, Article 28(1) of the Warsaw Convention is unenforceable in the case at bar.

East African makes the assertion that: "It is not uncommon for the jurisdiction of the United States Courts to be restricted or limited by treaty or international agreement," and cites *Hannevig v. United States*, 84 F.Supp. 743 (U.S. Ct. Cl., 1949); *Gmo. Niehaus & Co. v. United States*, 373 F.2d 944 (U.S. Ct. Cl., 1967) and *Shafter v. United States*, 273 F.Supp. 152 (S.D.N.Y., 1967), *aff'd*, 400 F.2d 584 (2d Cir. 1968), *cert. denied* 393 U.S. 1086 (1969).

None of the cited cases involve American citizens and none deal with the *constitutionally mandated diversity jurisdiction* of a federal district court. The first two cited cases (*Hannevig* and *Gmo. Niehaus & Co.*) involve the jurisdiction of the Court of Claims. *Shafter* was concerned with the Public Vessels Act, and did not consider the issue raised on this appeal.

It is evident from a fair reading of the aforesaid cases that they actually involve statutes waiving the immunity



of the United States from suit and the withdrawal of said immunity. They do not involve, as here, a treaty which has the effect of denying to American plaintiffs access (by virtue of diversity of citizenship) to the federal district courts as guaranteed and required by the United States Constitution, *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 378 (1821); Art. III, § 2; and as provided by the Congress, 28 U.S.C. § 1332 (a)(2).

Access to the federal courts is, moreover, constitutionally guaranteed if there is diversity. East African bases its claim to the contrary in part on cases holding that a United States citizen domiciled abroad cannot maintain an action in a federal district court.* The reason for this rule is that such a plaintiff is neither a citizen of a state of the United States nor a citizen of a foreign country. The Constitution, however, requires for diversity purposes that the plaintiff and the defendant be either citizens of different states or that the plaintiff be a citizen of a state and the defendant a citizen or subject of a foreign country. Thus, in the cases relied on by East African, the Constitutional requirement simply was not met, and are, therefore, wholly irrelevant herein. In the case at bar, the plaintiffs are citizens of a state** of the United States and defendant is a foreign airline.

* It should be noted that the American citizen domiciled abroad would have access to the state courts, and that East African claims that no court in this country has jurisdiction of the instant claims.

** The appellants' main Brief mistakenly states that the Fays were and are citizens of the State of New York. The Fays were citizens of New York at the time this action was commenced. They presently are citizens of the State of California.

CONCLUSION

The order below dismissing the plaintiffs' claims against the defendant East African should be reversed and the defendants' motion to dismiss denied.

Respectfully submitted,

KREINDL FINDLER

Attorneys for Appellants

99 ae

New York, New York 10016

(212) 687-8181

Of Counsel:

MELVIN I. FRIEDMAN

MILTON G. SINCOFF

JAMES J. SULLIVAN



Services of three (3) copies of

the within

hereby admitted this

is
29 day

of May, 1978

John J. Lefebvre

Attorney for

